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IN THE

Supreme Court of the United States

October Term, 1965

No. 305

DANA ALBERT DERFUS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California for the Second Appellate District.

HYMAN GOLD,
6939 Woodman Avenue,
Van Nuys, California,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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STATE OF CALIFORNIA,

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Petition for Writ of Certiorari to the District Court of Appeal of the State of California for the Second Appellate District.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Dana Albert Derfus, respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, for the Second Appellate District, in order to review its judgment affirming a judgment of the Superior Court of the State of California for the County of Los Angeles, in which judgment petitioner was adjudged guilty of the crime of taking a vehicle without the consent of the owner, to wit, the violation of the California Vehicle Code, Section 10851, and wherein petitioner was sentenced to State Prison for a period of from one to five years.

Opinions Below.

The Superior Court delivered no written opinion. The trial was by jury.

The Opinion of the District Court of Appeal was not published, pursuant to the provisions of Rule 976, California Rules of Court, in that the same was certified for non-publication by said court. A copy of said opinion is appended hereto as an Appendix and is marked Appendix A.

A petition for hearing was thereupon taken to the California Supreme Court, from which an order denying the said petition was dated, endorsed and entered on March 31, 1965.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is January 18, 1965.

2. A timely filed petition for hearing in the California Supreme Court was denied on March 31, 1965 (See Appendix C, attached hereto, which is a copy of the order denying petition for hearing in the California Supreme Court).

3. The statutory provisions believed to confer on the Supreme Court of the United States jurisdiction to review the judgment in question by Writ of Certiorari are:

Title 28 U.S.C. §1257(3);
Rule 37(b) Federal Rules of Criminal Procedure;
Rule 19(1)(a) of this Court.

4. An important and substantial question exists in which an issue of general importance is involved. That

is, the determination and settling of the question clearly as to whether the principles enunciated by this court in *Escobedo v. Illinois* extend to cover the rights of an accused suspect at times *other* than when he is being "actively interrogated" by the police. To wit: Does an arrested suspect waive, or lose, or not have the constitutional rights expressed in *Escobedo,* where he "voluntarily" makes prejudicial admissions or a confession at times when he is not being actively interrogated by the police, and where no advisement relating to his constitutional rights were ever made to him, with all other prerequisites present as in *Escobedo.*

Questions Presented for Review.

1. Is there a denial of due process of law where a state court permits evidence of a confession or prejudicial admissions of the defendant to be admitted into evidence before a jury in a criminal trial, where the admissions or confessions were not extracted in the immediate course of police interrogation, but were "voluntarily" made by the defendant to the investigating police, while under arrest and *after* the active formal interrogation had concluded: to wit, here, admissions made while defendant was in the police vehicle and being transported to the courthouse for arraignment, and again later a confession being made "voluntarily" while sitting in the prisoners' box in the courtroom awaiting the opening of the court session prior to arraignment. And where these admissions or confessions were made without the prisoner's being at any time prior thereto advised of his constitutional rights: (a) to counsel, and (b) that he had an absolute right to remain silent.

2. When the investigatory stages of a case are concluded by the police and the defendant is under arrest, and after a fruitless extensive interrogation had taken place, are then his constitutional rights any different when he is not being at the moment actively interrogated by the police than at those times when he is actually being so interrogated?

3. Does a suspect, while still in custody, forfeit his right to counsel and his right to remain silent if he volunteers damaging admissions or volunteers a confession, by virtue of the fact that no active interrogation is then in process, all other factors being the same: to wit, no advisement of his rights being made to him.

4. If not, does a brief talk with the Public Defender in the Court room prior to arraignment, wherein the accused is advised to remain silent until he has obtained private counsel [R. T. 201], constitute such an adequate advisement of his constitutional rights so as to bar him from the rights he would have, as set forth in *Escobedo v. Illinois.*

5. Is questioning and talking to a prisoner in the police vehicle, by the investigating officers, and while being transported to the courtroom for arraignment a sufficiently formal "interrogation" to fall within the rule expounded by *Escobedo?*

Constitutional Provisions and Statutes Involved.

The Sixth Amendment of the United States Constitution provides in pertinent part:

> "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ., and to have the assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution making the Sixth Amendment obligatory upon the states which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Gideon v. Wainwright (1962), 372 U.S. 335, 342;

Escobedo v. Illinois (1964), 378 U.S. 478.

Statement of the Case.

The basic facts of the case are clearly set forth in the opinion of the District Court of Appeal (see Appendix A). Petitioner was tried by a jury for a violation of the California Penal Code §4873(3) (grand theft), and in Count II with taking a vehicle without consent of owner, §10851 Vehicle Code [C. T. 1 and 2]. A prior felony was also charged by amendment. The jury acquitted petitioner on Count I, but found him guilty on the second count, and also found that he had suffered the prior conviction [C. T. 13-15].

The trial court sentenced applicant to the State prison for the term prescribed by law. Probation was denied. A motion for a new trial was denied (See Appendix B). [C. T. 17].

The District Court of Appeal, denied petitioners appeal therefrom on January 18, 1965. The federal questions were first raised in the appeal to the District Court of Appeal. *People v. Dorado* had just come down from the California Supreme Court.

The California Supreme Court denied a petition for hearing on March 31, 1965.

On the night of April 4, 1963, a Porsche sportscar was stolen from an open carport of an apartment house located across the alley from applicant's apartment. Three days later the applicant approached the victim, Stuart Gillette, and informed him he had seen a Porsche sportscar similar to his, and gave the location. This proved to be the stolen car. Missing from the car were a pair of sunglasses, a raincoat, a flashlight, some tools, and a spare wheel and tire.

Approximately six weeks later, officers Gastaldo and Bentley arrested applicant in his garage [R. T. 58, 59, 69, 75].

Formal police interrogation of the applicant took place from the time of his arrest [R. T. 70] off and on over a two day period to the time he was taken to the courtroom for arraignment.

At no time during the course of the trial was any evidence introduced that the investigating police or anyone else advised the applicant of his Constitutional right to counsel, or that he had a constitutional right to remain silent if he so desired

The fact that the record does not show that the applicant had been advised of his constitutional rights must be taken to presume that he was not so advised.

People v. Stewart, 62 A.C. No. 21, 597, 607 (decided March 25, 1965);

Carnley v. Cochran (1962), 369 U.S. 506.

The facts in this case are such that there can be no question that the investigatory stage of the case was completed and that all the admissions and the confession were made thereafter. Applicant was interrogated exten-

sively on May 20, 1963 and May 21, 1963 [R. T. 70, 71, 72, 90, 96]. Incriminating admissions were made by applicant to these investigating officers while en route to Division 68 of the Municipal Court for the purpose of arraigning him. While then being interrogated in the car he admitted he had taken the sunglasses and the wheel and tire [R. T. 71]. The court below held there was no "interrogation" at this time (Appendix A) but that a "voluntary statement" was made by defendant. We contend that there was a sufficiently formal interrogation here to fall within the *Escobedo* decision. Later, while awaiting arraignment in Division 68 in the courtroom, prior to court's being in session, applicant called one of the investigating officers over and "voluntarily confessed" [R. T. 72]. He stated: "Look, I stole the car. I was stone drunk". He added that he just took it for a joyride, but that he had no intention of stripping it [R. T. 72]. That he later returned, removed a wheel and tire and the sunglasses. That he sold the wheel and tire for $20.00.

No evidence whatever was presented at the trial to show that applicant had been advised of his constitutional right to counsel or to remain silent, except for applicant's brief conversation with the public defender [R. T. 200, 201, 229].

The inadmissibility of the confession was raised by applicant in his appeal to the District Court of Appeal (Reply to Respondent's Brief, pp. 5 and 6).

Applicant cited as authority the cases of: *People v. Dorado,* 61 A.C. No. 18, p. 892; *People v. Anderson,* 61 A.C. No. 13, p. 903; *Escobedo v. Illinois* (1964), 378 U.S. ...., 84 S. Ct. 1758, 12 L. Ed. 2d 977; *Massiah v. United States* (1964), 377 U.S. 201; *In re James,* 38 Cal. 2d 302, 310 (240 P. 2d 598).

The Court below rejected applicant's appeal, stating on page 5 of its opinion:

> "Finally, appellant contends that the confession was admitted into evidence in violation of the rule laid down in *Escobedo v. Illinois,* 84 S. Ct. 1758."
>
> "The first admissions made by appellant were made while he was being driven to the courthouse. The second admission was made while appellant was sitting in the courtroom and after appellant had been advised by the Public Defender to obtain private counsel. In neither instance does the record reveal an interrogation by the police. On the contrary, each instance shows a voluntary statement on appellant's part. The facts recited go completely beyond the scope of *Escobedo.*
>
> The judgment is affirmed."

Reasons for Granting the Writ and Argument Amplifying Same.

The holdings of this Honorable Court in *Escobedo v. Illinois,* 378 U.S. 478 decided June 22, 1964 is indicative of the rights to which a criminal defendant is entitled under our constitutional system, more particularly regarding the circumstances where a police investigation has focused upon a particular suspect in police custody who has not been warned of his constitutional right to keep silent, nor of his constitutional right to consult with legal counsel. This case points out that no statement extracted by the police during an interrogation under those circumstances may be used against him at a trial.

The critical question in this instant case is whether, under the circumstances, where an arrested prisoner who has not been advised of his constitutional rights to (a)

Counsel and (b) the right to remain silent if he so desires, loses or forfeits these rights if he makes confessions or admission concerning the crime charged, if they are made at any time other than when he is not under active, immediate, interrogation by the police. To wit; here, while being transported to the court for arraignment, and again while sitting in the prisoner's box awaiting arraignment, where the prisoner made a confession, and also admitted matters tending to incriminate him. Does the use of such confession or admissions, so obtained, in evidence before a jury, constitute a violation of the principle set forth in *Escobedo v. Illinois,* 378 U.S. 478, and consequently constitute a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment."

It is our position that a defendant in a criminal case does not waive or lose his constitutional rights because that circumstance.

As this Honorable Court pointed out in *Carnley v. Cochran* (369 U.S. 506), in quoting from *Johnson v. Zerbst*, 304 U.S. 458, 464-465:

> "It has been pointed out that 'Courts indulge every reasonable presumption against waiver' of fundamental rights and that we 'do not presume acquiescence in the loss of fundamental rights.' "

The philosophy and reason behind the rule that evidence obtained of confessions without advising the criminal defendant of his constitutional rights, is inadmissible in a trial, should apply here as well. The basic principle being that an intelligent and understanding waiver of these constitutional rights must have been

exercised. If this was not done there is no true exercise of his rights—to counsel or to remain silent, *Carnley v. Cochran* (*Id.*). Whether or not an "interrogation is proceeding" at the moment.

We respectfully stress the importance of a determination and a clarification of this area of law by this Honorable Court. The modern decisions on this point do not cover our situation. Rather, they involve whether or not the investigatory stages have or have not been completed by the police, or, having been given his warning-advise by the police, that the suspect later volunteers incriminating information. But no decisions exist to our knowledge covering situations such as we have here, by this Honorable Court, which would encompass the philosophy and reason behind the rules set out in the *Escobedo* and other modern cases in this area of law.

Additionally we contend that the discussion and questioning of Applicant by the investigating police, in the police vehicle, while being transported to the courtroom [R. T. 71] is a sufficiently formal "interrogation" to be classed within the rule of law expressed in *Escobedo v. Illinois*.

It is our contention that the Petitioner was prejudicially affected by the use of the admissions and the confession in the trial, and that such use of the confession and admissions were in violation of the Applicant's constitutional rights as aforestated.

Conclusion.

The petition for Writ of Certioari should be granted.

Respectfully submitted,

HYMAN GOLD,

Attorney for Petitioner.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, vs. Dana Albert Derfus, Defendant and Appellant. Crim. No. 9918.

Filed Jan. 18, 1965.

Appeal from the judgment of the Superior Court of Los Angeles County and from order denying motion for new trial. John G. Barnes, Judge. Judgment affirmed. Appeal from order dismissed.

For Appellant: Hyman Gold.

For Respondent: Thomas C. Lynch, Attorney General; Doris H. Maier, Assistant Attorney General; Ronald W. Tochterman, Deputy Attorney General.

Appellant was charged in Count I of an information with violation of Penal Code, §487(3): grand theft; and in Count II with violation of Vehicle Code, section 10851: taking a vehicle without consent of owner. A prior felony was also charged by amendment.

On January 30, 1964, a jury acquitted on Count I but found appellant guilty on the second Count and also found that he had suffered the prior conviction. He appeals from the judgment of conviction and from the order of the trial court denying his motion for a new trial.[1]

On the night of April 4, 1963, a Porsche sportscar was stolen from the open carport of an apartment house

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[1]This is dismissed as a non-appealable order (P.C. §1237).

located across the alley from appellant's apartment. Three days later appellant approached Stewart Gillette, the dispossessed owner of the car, and in an ensuing conversation, after the fact of the theft had been established, told Gillette that he had seen a Porsche similar to Gillette's parked on Foothill Boulevard in the Sunland section of Los Angeles.

Gillette went to the described location and contacted the police who in turn found the car in a nearby auto wrecking yard. Missing from the Porsche was a pair of sunglasses, a raincoat, a flashlight, some tools, and a spare wheel and tire.

On the following day Gillette again talked with appellant and noticed that he was wearing the stolen sunglasses.

Approximately six weeks later officers Gastaldo and Bentley arrested appellant in his garage while he was repairing a friend's car. Appellant requested and was granted permission by the officers to wash and clean up in his apartment. Gastaldo testified that he accompanied appellant into the apartment at appellant's invitation and that appellant went into the kitchen to wash his hands. Gastaldo saw the stolen sunglasses on the kitchen table.

On the day of appellant's arraignment, while in transit to the courthouse, appellant admitted to Gastaldo that he had taken the sunglasses and the spare wheel and tire from the Porsche, but he denied stealing the car. Awaiting the arraignment proceedings, and before the judge took the bench, and after appellant had been advised by the public defender to seek private counsel, appellant called Gastaldo over to where he was sitting in

the courtoom and said, "Look, I stole the car. I was stone drunk." He said he merely intended to take it for a joyride and that he abandoned it when something went wrong with it on Foothill Boulevard. He also told Gastaldo that he later returned in his own car and removed the missing items. He offered to assist in the return of the missing wheel and tire and was allowed to place a call to one Carter Phillips who told the police that he had in fact obtained a Porsche wheel and tire from appellant.

Appellant contends that the sunglasses found in his room were improperly introduced into evidence over his objection of an illegal search and seizure. He urges that the police lacked probable cause to make an arrest and, further, that even if the arrest was valid, the search was not contemporaneous with the arrest.

We find no merit in this contention.

The test for probable cause is that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. (*People v. Ingle,* 53 Cal. 2d 407, 412.)

The record before us discloses that the police had sufficient grounds upon which to base their belief that appellant had committed the theft. They knew appellant lived across the alley from the carport in which the Porsche was parked; that he had directed Gillette to the location of the missing Porsche and that he had been seen wearing the stolen sunglasses. The latter element alone was sufficient to establish probable cause.

The argument that there was a search not concurrent with the arrest is not tenable. Whether officer Gastaldo

was in appellant's room by invitation or in the performance of his duty to guard appellant after appellant had asked permission to clean up, (and it is clear too from the record that there were reasonable grounds for the arrest) that officer Gastaldo was in appellant's room because appellant expressly or impliedly consented to his presence. Once inside the apartment the officer did not have to blind himself to what was in plain view. (*People v. Roberts,* 182 Cal. App. 2d 431, 438; *People v. Jaurequi,* 142 Cal. App. 2d 555, 561.)

Appellant also contends that the evidence was insufficient to support the conviction since the case hinged on appellant's purported confession, the act of which in the circumstances was so inherently improbable as to be incredible and thus no evidence at all.

The credibility of the officer was a question for the jury. However, it is established that evidence which is inherently improbable, in the sense of physical impossibility, or so clearly false and unbelievable that reasonable minds may not differ, may be rejected as not constituting "any evidence". (*People v. Manuel,* 94 Cal. App. 2d 20, 23.) Appellant cites no authority for the proposition that evidence which seems unlikely or presents unusual circumstances is within this exception to the general rule. The testimony of the officer as to appellant's confession and the circumstances under which it was made, are certainly unusual, but the evidence so given is not inherently improbable. (*People v. Penrice,* 195 Cal. App. 2d 360, 363.)

Finally, appellant contends that the confession was admitted into evidence in violation of the rule laid down in *Escobedo v. Illinois,* 84 S. Ct. 1758.

The first admissions made by appellant were made while he was being driven to the courthouse. The second admission was made while appellant was sitting in the courtroom and after appellant had been advised by the public defender to obtain private counsel. In neither instance does the record reveal an interrogation by the police. On the contrary, each instance shows a voluntary statement on appellant's part. The facts recited go completely beyond the scope of *Escobedo.*

The judgment is affirmed.

Roth, *P. J.*

We Concur:
Herndon, *J.*
Fleming, *J.*

The Court: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.

APPENDIX B.

Judgment.

Superior Court of the State of California, for the County of Los Angeles.

Department No. 109, Present Hon. John G. Barnes, Judge.

March 9, 1964.

The People of the State of California, vs. Dana Albert Derfus, 275266.

Matter of Probation and sentence is called for hearing. Deputy District Attorney John M. Provenzano and the Defendant with counsel, Hyman Gold, present. Defendant's motion for a new trial is argued and denied. Probation denied. Sentenced as indicated. Bail exonerated.

Whereas the said defendant having been duly found guilty in this court of the crime of Violation of Section 10851, Vehicle Code, a felony, as charged in Count 2 of the information; prior conviction having been found true as alleged, to wit: Robbery, a felony, Superior Court of the State of California, County of Los Angeles, May 25, 1956 and served a term in the State Prison.

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

APPENDIX C.

Order Denying Hearing After Judgment by District Court of Appeal.

In the Supreme Court of the State of California, in Bank.

People v. Derfus, 2nd District, Division 2, Crim. No. 9918.

Order Due April 16, 1965.

Filed Mar. 31, 1965. William I. Sullivan, Clerk. By S. F. Deputy.

Appellant's petition for hearing Denied.

Traynor
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 3rd day of June A.D. 1965.

By R. Johnson, Deputy Clerk.

PETITION FOR REHEARING

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Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

HYMAN GOLD,
125 North Gale Drive,
Beverly Hills, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 305

DANA ALBERT DERFUS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Dana Albert Derfus, respectfully prays that this Court grant rehearing of its order of December 13, 1965, denying the petition for writ of certiorari heretofore filed with this court, and that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, for the Second Appellate District, for which a petition for hearing was denied by the Supreme Court of the State of California.

Reasons for Granting Rehearing and Issuing the Writ.

At the time of this Court's order of December 13, 1965, wherein certiorari was denied, petitioner's claim was based in part upon admissions made to police regarding the crime, which admissions were used at the

trial in violation of the rule laid down in *Escobedo v. Illinois,* 84 S. Ct. 1758.

Additionally, however, the facts set forth in the petition show that the defendant-petitioner consulted with a public defender just prior to his confession. While it was our feeling that this brief conference with the public defender did not constitute sufficient protection of defendant-petitioner's constitutional rights as required in *Escobedo.* Yet even if it did in fact give him adequate protection of his rights, *from that point on,* we contend that the admission made prior to this time, and used in the trial [R. T. 71] was sufficient to cause the trial to be tainted and required reversal.

As an analogous situation we cite *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 1 A.L.R. 3rd 1205, which states at page 1213:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers v. Richmond,* 365 U.S. 534, 5 L. Ed. 760, 80 S. Ct. 735, and even though there is ample evidence aside from the confession to support the conviction. *Malinsky v. New York,* 324 U.S. 401, 89 L. Ed. 1029, 655 S. Ct. 781; *Stroble v California,* 343 U.S. 181, 96 L. Ed. 871, 72 S. Ct. 599; (and others cited) . . ."

In the *Jackson v. Denno* case (*supra*) two confessions were involved, as was the situation in our instant case. The majority opinion of the Supreme Court of the United States did not differentiate between them in

setting aside the conviction. But the Honorable Mr. Justice Black, in a separate concurring opinion does differentiate between one confession and the second confession, which was made about one and one-half hours later. He felt that the last confession, but not the first statement, was given under circumstances inherently coercive, and therefore was not constitutionally admissible under the Fifth and Fourteenth Amendments, and for that reason concurred in the reversal of the judgment below. (He did, however, dissent with other parts of the majority opinion, which are not applicable to us here.)

Therefore, extending this principle to our instant case, it would require that when part of the confessions or admissions were illegally obtained (in violation of the safeguards set forth in *Escobedo*) and used, the entire case must fail, even though a confession was obtained after consultation with counsel (the public defender, here) which could have been adequate in itself. That the illegally obtained admission would necessarily taint the entire case.

Conclusion.

For the reasons set forth above and also in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the District Court of Appeal of the State of California, for the Second Appellate District.

Respectfully submitted,

HYMAN GOLD,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

HYMAN GOLD,
Counsel for Petitioner.